9-2-2016

Salinas v. Bridgeview Estates Appellant's Brief Dckt. 44186

IN THE SUPREME COURT FOR THE STATE OF IDAHO

LETICIA SALINAS, Claimant/Respondent, v. BRIDGEVIEW ESTATES, Employer, and OLD REPUBLIC INS. CO., Surety, Defendants/Appellants.	)	**SUPREME COURT NO. 44186** IIC Case No. 2011-014120 **APPELLANTS' BRIEF**

APPEAL FROM THE IDAHO INDUSTRIAL COMMISSION
CHAIRMAN R.D. MAYNARD PRESIDING

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QUESTION PRESENTED

1. Pursuant to Idaho Code § 72-804, did the Idaho Industrial Commission err as a matter of law in awarding attorney fees for "prolonged denial of medical benefits" where the claimant was awarded no compensation other than attorney fees?

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STANDARD OF REVIEW

This appeal arises from the award of attorney fees pursuant to I.C. § 72-804 by the Idaho Industrial Commission. The relevant facts are not in dispute. The question presented in this case turns on the construction and application of the statute. The Idaho Supreme Court exercises free review over questions of the "construction and application of a legislative act" as "pure questions of law." *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 905, 980 P.2d 566, 569 (1999).

STATEMENT OF THE CASE

On or about, May 5, 2011, Claimant sustained a low back strain while working for Appellant Employer. R. 5:10-12, 5:18. Thereafter, Claimant sought medical care and, beginning June 1, 2016, Claimant received conservative treatment for low back strain from Dr. Douglas Stagg. R. 5:15-7:13. In July 2011, Dr. Stagg ordered an MRI that revealed "mild degenerative disc disease but no evidence of acute traumatic changes." R. 7:4-6.

Claimant visited Dr. Stagg for the final time on July, 13, 2011. R. 7:7-13. At this final visit with Claimant, Dr. Stagg explained the negative findings from the MRI to Claimant and scheduled a follow-up visit with her on July 20, 2011. R. 7:9-11. Claimant "was a no-show" for the July 20, 2011, appointment with Dr. Stagg. R. 7:12-13, R. 15:8-10. Claimant attended a single session of physical therapy on July 18, 2016, but Claimant canceled her scheduled physical therapy visit on July 21, 2011. R. 7:14-17. At hearing, Claimant testified that the physical therapy treatment was "ridiculous" and not useful for her back problem. R. 15:22, R. 16:10-11. When Claimant treated with Dr. McClusky in July 2012, "she denied any pain at that time" and "did not mention any low back issues." R. 7:18-20.

On the basis of Claimant's testimony, the Referee accepted that Claimant was cut-off

from treatment for her work injury because Surety did not return her phone calls after it temporarily suspended care to obtain a medical release and medical records. R. 14:21-15:5, R. 16:17-20.

Claimant next treated for her low back nearly two years later: first with Dr. Joshua Olsen and, thereafter, with Dr. Dr. Jill Adepoju ("Dr. Jill"). R. 8:1-6. Claimant returned sporadically to Dr. Jill through January 20, 2014. R. 8:5-9:5. Dr. Jill encouraged "more regular and frequent visits," two to three times a week, while "Claimant expressed doubts if she could afford that level of treatment." R. 8:18-20, R. 9:7-8. Late in 2014, Claimant returned to Dr. Jill for three treatments but did not treat with her again until after Dr. Jill issued a report on March 8, 2015, that opined Claimant's complaints were related to her 2011 industrial accident. R. 9:14-20. Following Dr. Jill's report, Claimant treated consistently with Dr. Jill with "subjective improvement [that] began almost immediately." R. 10:3-5.

On June 29, 2015, Claimant obtained an independent medical evaluation ("IME") from Twin Falls chiropractor, Dr. Anthony Sirucek, also Dr. Jill's father. R. 11:6-7. Dr. Sirucek opined that Claimant's low back complaints were causally related to her 2011 industrial injury, that Claimant had reached maximum medical improvement, and that Claimant would require Dr. Jill's palliative care indefinitely. R. 11:10-24. Further, Dr. Sirucek assigned a permanent partial impairment of 2%. R. 11:24-28.

In May 2015, Appellants obtained the IME opinion of Boise neurosurgeon, Dr. Michael Hajjar. R. 12:2-4. Based on his examination of the Claimant and a review of her medical records, Dr. Hajjar opined that Claimant reached medical stability in November 2011 because Claimant's lumbar strain "had completely run its course within six (6) months of the injury." R. 12:2-7. Even though he recommended restrictions for Claimant's unrelated back issues, Dr.

Hajjar assigned no permanent partial impairment as a result of the 2011 injury. R. 12:9-14.

Following hearing of the matter August 6, 2015, the Referee determined that the "weight of [Claimant's] contested testimony" was diminished when not corroborated based on his assessment of her substantive credibility. R. 13:4-14:11. The Referee observed, "Part of the issue appears to be the fact that [Claimant] is a poor historian. Part of the issue appears to be that Claimant seemed willing to say whatever sounded good and assisted her case, not necessarily with a contriving intent but with an almost casual indifference toward accuracy." R. 14:1-4.

Further, the opinion of Dr. Sirucek was entitled to less weight because he did not consider the full history of low back complaints. R. 18:5-8. Claimant's pre-existing low back issues dated back to at least December 2006 and included prior workers' compensation injuries. R. 10:17-11:3, R. 13:11-19. "[B]y ignoring or being in the dark about Claimant's true history of low back complaints," the incomplete information considered "could skew his outcome." R. 18:11-13. The opinion of Dr. Jill was similarly defective. R. 18:13.

The Referee recommended adoption of the Findings of Fact and Conclusions of Law, including the following findings:

> Finding No. 57: The Claimant has not proven the right to past unpaid medical care or future medical care, palliative or curative, related to her May 5, 2011, industrial accident. R. 20:15-16.
>
> Finding No. 62: When considering the record as a whole, Claimant has failed to prove she suffered a permanent impairment as a result of her May 5, 2011, industrial accident, and thus is not entitled to PPI benefits. R. 22:3-5.
>
> Finding No. 63: Claimant has failed to prove she is entitled to PPD benefits. R. 22:9.
>
> Finding No. 74: The fact that Claimant did not prevail on her causation claim does not prove Surety acted reasonably. Idaho Code § 72-804 does not speak in terms of a prevailing party. To

> obtain attorney fees under the statute, Claimant need only prove one of the (3) prohibited behaviors. For an award of attorney fees in this case, Claimant must, and did, prove (1) an industrial injury, (2) causally-related treatment (prior to November 2011) for such injury, and (3) Surety discontinuing such causally-related treatment without reasonable grounds. Claimant has satisfied her obligation for an award of attorney fees in pursuing this litigation. R. 25:7-13.

By its Order filed March 4, 2016, the Industrial Commission adopted the Conclusions of Law recommended by the Referee that Claimant Salinas failed to prove her claims for medical and indemnity benefits related to her industrial accident of May 5, 2011. R. 1, 26. However, while Claimant failed to show entitlement for any additional medical benefits, permanent partial impairment, or permanent partial disability, the Commission ordered the award of attorney fees to Claimant "for Surety's prolonged discontinuation of medical benefits without a reasonable ground." R. 28-29. By further order dated April 28, 2016, the Commission declined to reconsider the attorney fees issue. R. 45, 47:3-4.

ARGUMENT

I. THE COMMISSION COMMITTED ERROR AS A MATTER OF LAW IN AWARDING ATTORNEY FEES TO CLAIMANT BECAUSE APPELLANTS OWED NO PAYMENT OF COMPENSATION TO CLAIMANT, THUS, REGARDLESS OF THE COMMISSION'S FINDING OF UNREASONABLE CONDUCT, NO BASIS EXISTED FOR THE AWARD OF ATTORNEY FEES UNDER THE PLAIN LANGUAGE OF I.C. §72-804.

The Commission's imposition of attorney fees on Appellants is error because the facts of this case fall outside the scope of the statutory prohibitions of I.C. § 72-804.[1] I.C. § 72-804 provides:

[1] Other than the provision for attorney fees against uninsured employers contained in I.C. § 72-210, the Industrial Commission's authority to assess attorney fees is limited to the circumstances specified and defined by I.C. § 72-804. Where the Commission seeks to award attorney fees under circumstances beyond those provided by the statute, the Commission exceeds the authority granted to it by the legislature.

> If the commission or any court before whom any proceedings are brought under this law determines [1] that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or [2] that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or [3] without reasonable grounds discontinued **payment of compensation as provided by law justly due and owing** to the employee or his dependents, the employer shall pay reasonable attorney fees **in addition to** the compensation provided by this law.

(emphasis added).

Here, Appellants agree with the Commission that the first two prohibitions of I.C. § 72-804 are inapposite to the facts of this case. However, where Claimant failed to prove entitlement to benefits and was not awarded compensation, the imposition of attorney fees under the third prohibition for "discontinued payment of compensation justly due and owing" cannot be sustained. Mere findings that Surety delayed its decision regarding medical coverage or that it failed to communicate with the Claimant may support a determination that Surety acted unreasonably but is insufficient to establish that payment of compensation is justly due and owing. As a matter of first impression, the Commission's expansive interpretation of the scope of I.C. § 72-804 must be rejected because the interpretation is inconsistent with (1) the plain and unambiguous meaning of the statute and (2) the underlying legislative intent.

A. <u>The plain and unambiguous language of I.C. 72-804 fails to support an award of attorney fees in this case because there was no award of compensation to the Claimant by the Commission, thus, no payment of compensation was justly due and owing.</u>

The Commission's award of attorney fees for unreasonable conduct in the absence of an award of compensation violates the clear meaning of the provision. Well-settled law provides the

meaning that must be given to statutory language:

> The statute is viewed as a whole, and the analysis begins with the language of the statute, which is given its plain, usual and ordinary meaning. In determining the ordinary meaning of the statute, **effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant**.

Twin Lakes Canal Co. v. Choules, 151 Idaho 214, 216, 254 P.3d 1210, 1212 (2011) (emphasis added). "Where the language of a statute is plain and unambiguous," effect must be given effect to the language "as written without engaging in statutory construction." *Id.* at 218, 254 P.3d at 1214; *Roe v. Hopper*, 90 Idaho 22, 27, 408 P.2d 161(1965) ("This [C]ourt has long adhered to the rule that we must accept the statutes as we find them and construe them as they read, where they are plain and unambiguous, and are not permitted to apply rules of construction in the absence of ambiguity."). In *Roe*, the Court explained that ambiguity means "doubtfulness, doubleness of meaning or indistinctness or uncertainty of meaning of an expression." 90 Idaho at 27, 408 P.2d at 166. Offering a further admonition, The *Roe* Court advised:

> Where the language of a statute is clear, as we believe it to be in this instance, the court cannot speculate upon the intention of the legislature, *much less read something into the statute which is not there*, but must accept the interpretation of the act as it appears from its plain and unambiguous language.

Id. (emphasis added).

Here, the Commission cannot attach its own interpretation to the third prohibition of § 72-804 because the rules of construction may not be applied to statutory language that is plain and obvious. Considering the meaning of each word in the context of the whole statute, the phrase in question "without reasonable grounds discontinued **payment of compensation as provided by law justly due and owing** to the employee or his dependents" has plain and obvious meaning. Thus, under the plain meaning of the words, this prong of the statute prohibits

unreasonable discontinuation of compensation but specifically limits the circumstances to those were compensation remains owing. Placing the plain meaning of the words within the context of an attorney fees statute, the plain and obvious meaning is that no compensation is justly due and owing where no award of compensation results from the litigation. This meaning is supported by the final portion of the statute that requires "reasonable attorney fees **in addition to** the compensation provided by this law." According to the *Oxford English Dictionary*, the meaning of "in addition" is "an extra thing or circumstance." *Oxford English Dictionary* vol. 1, 143 (J.A. Simpson & E.S.C. Weiner eds., Clarendon Press Oxford 1989). Thus, for attorney fees to be *extra*, there must first be compensation owed.

In this case, not only does the Commission seek to place its own interpretation on this unambiguous statute, the Commission commits error by reading into the statute provisions that simply are not there. In its Order Denying Reconsideration, the Commission awards attorney fees on the basis that Surety's conduct was unreasonable *at the time in question* in failing to communicate and by delaying its decision on an open claim. R.48:5-7. Again, because the statute must be considered within the context of attorney fees, the award of attorney fees should not turn on whether there was unreasonable conduct during the pendency of the claim. Instead, the award should properly focus on whether compensation remained due and owing at the time of the hearing as a result of misconduct during the claim. Following the Commission's reasoning to its logical conclusion, any mishandling of a claim could be subject to an award of attorney fees regardless of whether any compensation remains outstanding at the time of hearing. While Appellants strongly disagree with the finding that Surety's claim handling conduct was unreasonable, they recognize the authority of the Commission to make such a determination. However, even accepting the finding that the claims handling conduct was unreasonable, no

basis for an award of attorney fees exists because Claimant failed to prove her entitlement to compensation owing.

By construing § 72-804 to mean that a Claimant must prove only (1) an industrial injury, (2) causally-related treatment, and (3) discontinuation of causally-related treatment without reasonable grounds, the Commission illustrates that its interpretation renders certain words of the provision superfluous. By eliminating the words "payment of" and "in addition to," the necessary components that must be proven for an attorney fee award are altered such that certain language selected by the legislature becomes meaningless. Proving merely that treatment was provided at some point as suggested by the Commission's reading of the statute is a much lower bar than proving one's entitlement to "payment of compensation justly due and owing" as required by the statute's plain meaning. Accordingly, the interpretation offered by the Commission must fail because by ignoring some of the provision's words, the absurd result may attain that attorney fees could be awarded where the claimant has failed to show any entitlement to compensation under the law. So, while the legislature did not choose to use the term 'prevailing party' in the attorney fee statute, nonetheless, it is plain and obvious that a Claimant must prevail on at least one of his claims and be awarded compensation to satisfy a meaning that gives effect to all the words of the statute. Therefore, pursuant to the plain and unambiguous language of I.C. § 72-804, the award of attorney fees should be reversed as a matter of law.

B. However, even if the Court were to conclude that the language of the statutory provision in question was ambiguous, well-settled rules of statutory construction disfavor the Commission's interpretation of I.C. § 72-804 because the interpretation ignores the context of legislative intent and may produce absurd or unreasonably harsh results.

The accepted rules of statutory construction disfavor the Commissions interpretation of I.C. § 72-804. Where "the language of [a] statute is capable of more than one reasonable construction[,] it is ambiguous." *Twin Lakes*, 151 Idaho at 216-17, 254 P.3d at 1212-13. Ambiguities "must be construed with legislative intent in mind, which is ascertained by examining not only the literal words of the statute, but the reasonableness of the proposed interpretations, the policy behind the statute, and its legislative history." *Id.* Statutory constructions leading to absurd or unreasonably harsh results are disfavored. *State v. Doe*, 140 Idaho 271, 275, 92 P.3d 521, 525 (2004) (explaining that the state sponsored construction of a statute that criminalized virtually all student misconduct was disfavored because it was unreasonably harsh and was contrary to legislative intent). When statutes are construed, the assumption should be made that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed. *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994).

Here, the legislature provided for the award of attorney fees in certain cases so as "to encourage claimants to press claims which, but for such provision, would not be worth their time and effort once the cost of hiring an attorney had been deducted from the award." *Hogaboom v. Economy Mattress*, 107 Idaho 13, 17, 684 P.2d 990, 994 (1984). That there exists an award other than attorney fees is essential to the legislative purpose announced by the *Hogaboom* Court; the attorney fees statute meant to encourage the prosecution of small but meritorious claims. Appellants do not argue that minor injuries lack merit; nor do Appellants argue that minor injuries do not deserve prompt and responsive claim handling. However, where an interpretation strains the intended legislative purpose because it encourages a claimant to litigate under facts such as those in this case, the interpretation should be rejected because it

compromises the expressed legislative purpose. That a claimant with a resolved, minor injury and nothing owed in cognizable compensation should be awarded attorney fees is patently absurd. Appellants looked for but could not find any other case awarding attorney fees where the claimant was awarded no compensation other than the attorney fees.

The interpretation sponsored by the Commission that subjects nearly all unreasonable conduct, even if such conduct was only brief as it was here, to the unreasonably harsh result that fees could be awarded even where nothing else is owed should be rejected. Like the construction of the statute in *Doe*, the Commission's construction should be disfavored and set aside because the interpretation exceeds the intent of the legislature.

Finally, an award of attorney fees in the absence of any entitlement to benefits corrupts the basic legislative purpose of the statute because rather than encouraging claimants to press small value claims, it can encourage claims that are not meritorious. In not using the words "prevailing party," the legislature did not express that attorney fees should be awarded to a claimant unable to show entitlement to an award for compensation; rather, the word choice reflects the intent of the legislature to limit awards of attorney fees to claimants only and prohibit awards of attorney fees to prevailing employers. As a matter of law, the award of attorney fees should be reversed because the interpretation under which the fees were granted was unreasonable and cannot be reconciled with the statute's legislative intent.

CONCLUSION

For the following reasons, Appellants ask this Court to reject the Commission's interpretation of I.C. § 72-804 and reverse the Commission's award of attorney fees to Claimant. First, the plain and unambiguous language of I.C. § 72-804 requires that payment of

compensation be justly due and owing to Claimant and no such award of compensation was granted here. Further, pursuant to the provision's "in addition to" language, compensation must be owing before attorney fees may be awarded. Second, the award of attorney fees should be reversed because the statutory construction relied on by the Commission in making the award is unreasonable and fails to honor the policy underlying I.C. § 72-804.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of September, 2016, I caused two (2) true and correct copies of the foregoing to be served upon:

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by depositing the same in the United States mail, postage prepaid, addressed to the above-named, the last known address as set forth above.

Legal Assistant
GARDNER LAW OFFICE